

EXHIBIT "A"  
STATE OF MONTANA  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE PERMIT  
NO. 2816-s40G BY  
ROBERT BOND

**FILMED**  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER  
APR 6 1990

Pursuant to the Montana Water Use Act and Administrative Procedure Act, a combined hearing on objections to the above-named application and objections to Application No. 2364-s40G, 2815-s40G, 2518-s40G, 2517-s40G, 2680-s40G, and 2679-s40G was held on April 15, 1975, at Chester, Montana.

The Applicant, Robert Bond, appeared at the hearing and presented testimony. The Applicant's lessee, Jim Grammer, appeared at the hearing and presented testimony. They were represented by counsel, Paul Bunn, Esq., of Chester, Montana. Ralph Eklund, Soil Conservation Service technician in Chester, presented testimony on behalf of the Applicant.

Arthur Rambo, Mike Burkhartsmeier, Virgil Jurenka, and Terry Stevenson all submitted timely objections to the application. Mr. Rambo, Mr. Burkhartsmeier, and Mr. Jurenka appeared at the hearing and presented testimony. All the objectors were represented by counsel, John Warner, Esq., of Havre, Montana. Mr. Warner presented testimony on behalf of Mr. Stevenson.

Through counsel, Mr. Warner, the objectors offered into evidence a map of the Sage Creek area, a copy of a district court complaint, and four lists of Notice of Appropriation of Water Right appurtenant to the objectors' property. These were marked as "Objectors' Exhibits 1 through 6" and received into evidence without objection.

A Proposed Order (Proposal for Decision) on the above hearing was issued by the Hearing Examiner, James A. Lewis, on November 14, 1975. The

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Proposed Order specified that the Proposed Order would become final when accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation, that written exceptions to the Proposed Order must be filed with the Department within ten (10) days of receipt of same, and that upon receipt of any written exceptions by the Department, opportunity would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On December 3, 1975, the Department received a letter dated December 2, 1975, from John Warner, attorney at law in Havre, who represents the four objectors in this matter, requesting an extension of time until December 31, 1975, in which to fully consider the possibility of filing an exception to the Proposed Order. The Department by letter of December 4, 1975, granted Mr. Warner's requested extension of time to December 31, 1975.

An Exception and Brief dated December 23, 1975, was filed by Paul C. Bunn, attorney for the Applicant, opposing the Proposal for Decision as entered on November 14, 1975, by the Hearing Examiner, in the matter of Application No. 2815-s406, also by Robert Bond.

The Department by letter of January 6, 1976, sent a letter to Paul C. Bunn, attorney for the Applicant, which stated in part as follows:

"A close review of your exception indicates that there must be a misunderstanding as to the application and following Proposed Order that you are excepting. Application No. 2815-s406 did not receive an Interim Permit nor does the Proposed Order require a permanent drainage device; therefore, we must conclude that you are making your exception to Application No. 2816-s406. Application No. 2816-s406 did receive an Interim Permit and the Proposed Order did require the permanent installation of an adequate drainage device,

channel, or any other necessary means to satisfy existing water rights . . . . Please make written verification that your exception is directed to Application No. 2816-s40G and not 2815-s40G."

Mr. Bunn, by his letter of January 15, 1976, to the Department, stated, "Please be advised that my exceptions were directed to Application No. 2816-s40G . . . ."

A Memorandum in Opposition to Exceptions to Proposal for Decision was filed by John Warner on behalf of the objectors, as dated on January 6, 1976. This memorandum was filed as a reply to Mr. Bunn's Exception and Brief dated December 23, 1975. By letter dated January 12, 1976, the Department acknowledged receipt of Mr. Warner's memorandum.

The Department, by telephone discussion on January 16, 1976, with Mr. Bunn, was informed that his exception also included his brief on this matter and that he did not wish to pursue this matter to an oral argument hearing before the Administrator of the Water Resources Division.

By letter of January 20, 1976, the Department informed Mr. Warner of Mr. Bunn's verbal statement, and Mr. Warner was requested to reply in writing indicating if he wished to pursue his memorandum to an oral argument hearing before the Administrator. He was also informed that should he decide not to pursue this opportunity the Administrator would propose and issue a Final Order on the record in the application file at present.

Mr. Warner by letter dated January 27, 1976, to the Department, stated, "I do not request oral argument before the Administrator. The matter may be submitted on the briefs."

The Department by letter dated February 4, 1976, to Mr. Warner, with copies to Paul C. Bunn and Robert Bond, stated in part, "Since neither party wishes to pursue this to an oral argument hearing, please be advised that this matter will be forwarded to the Water Resources Division

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Administrator for preparation and issuance of a Final Order on the record in the application file at present."

Since none of the parties in this matter requested an oral argument hearing on their objections, exceptions, and memorandums or briefs before the Administrator, the Administrator of the Water Resources Division hereby makes the following Final Order, based on the Proposed Order of November 14, 1975, the objections, exceptions, memorandums or briefs, and all pertinent information filed by parties to this matter, and made a permanent record of the application.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on November 14, 1975, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order; except that the Proposed Order is hereby modified as follows:

#### FINAL ORDER

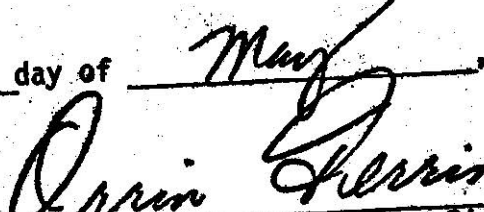
1. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 2816-s40G to appropriate 2 acre-feet of water per annum from an unnamed tributary of Big Sage Creek, in Liberty County, Montana, to be impounded in a 2-acre-foot reservoir on said unnamed tributary at a point in the SE $\frac{1}{4}$  of Section 12, Township 36 North, Range 5 East, M.P.M., and used for stock-watering purposes from May 1 to October 1, inclusive, of each year.

2. The permit is subject to all prior water rights in the source of supply, and subject to any final determination of prior existing water rights as provided by Montana law.

3. The permit is subject to the portable or permanent installation of an adequate drainage device, channel, bypass, or any other necessary means to drain the reservoir in order to satisfy prior water rights. Plans for said adequate drainage device must be submitted to and approved by the Department.

4. The permit is subject to the condition that said adequate drainage device be permanently installed or at all times is made portably available to drain said reservoir, if necessary, within one (1) year after the date of this Final Order, or within any Departmental authorized extension of time.

Done this 24<sup>th</sup> day of May, 1976.

  
Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

**NOTICE:** Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation  
Natural Resources Building  
32 South Ewing  
Helena, MT 59601

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BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

-----  
IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT )  
NO. 2816-s40G. ROBERT BOND )

PROPOSAL FOR DECISION  
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ISSUES

1. Water Rights, unappropriated water, adverse effect:  
Does the bare assertion that the Objectors have not been able to exercise their water rights for the last 2 or 3 years, which have been drought, years constitute conclusive evidence that there are no unappropriated waters and that the proposed appropriation will adversely affect prior rights?

2. Administrative Law, Water Rights: Can the Department revoke an interim permit and deny an application for beneficial water use permit because the permittee failed to comply with the conditions of the interim permit?

3. Water Rights: Can the Department condition water use permits for stockwater reservoirs subject to installation of a drainage device adequate to protect prior existing rights?

4. Water Rights: Adverse Effect: Does equivocal testimony establish the fact that water would not reach the Objectors in any event?

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MEMORANDUM

Pursuant to the Montana Water Use and Administrative Procedures Acts, a combined hearing on objections to the above-named application and objections to Application Numbers 2364-s40G, 2815-s40G, 2518-s40G, 2517-s40G, 2680-s40G, 2679-s40G, was held April 15, 1975 at Chester, Montana.

The Applicant, Robert Bond, appeared at the hearing and presented testimony. The Applicant's lessee, Jim Grammer, appeared at the hearing and presented testimony. They were represented by counsel, Mr. Paul Bunn, Esq., of Chester, Montana. Mr. Ralph Eklund, Soil Conservation Service technician in Chester, presented testimony on behalf of the Applicant.

Mr. Arthur Rambo, Mr. Mike Burkhardtsmeyer, Mr. Virgil Jurenka, and Mr. Terry Stevenson all submitted timely objections to the application. Mr. Rambo, Mr. Burkhardtsmeyer, and Mr. Jurenka appeared at the hearing and presented testimony. All the objectors were represented by counsel, Mr. John Warner, Esq., of Havre, Montana. Mr. Warner presented testimony on behalf of Mr. Stevenson.

Through counsel, Mr. Warner, the objectors offered into evidence a map of the Sage Creek area, a copy of a District Court complaint, and four lists of Notice of Appropriation of Water Right appurtenant to the Objectors' property. These were marked as Objector's Exhibits 1 through 6 and received into evidence without objection.

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On July 5, 1974, the Applicant submitted Application No. 2816-s40G with the Department seeking to appropriate 2 acre-feet of water per annum from an unnamed tributary of Big Sage Creek in Liberty County, Montana. The water is to be impounded in a 2-acre-foot reservoir on said unnamed tributary at a point in the SE 1/4 of Sec. 12, T. 36N., R. 5E., M.P.M., and used for stockwatering purposes from May 1 to October 1, inclusive, of each year. The application states that the dam and reservoir will be designed by the Soil Conservation Service. The reservoir will serve 80 head of cattle.

On September 13, 1974 the Department issued an Interim Permit No. 2816-s40G, based on this Application No. 2816-s40G.

On January 7, 1975, Mr. Terry Stevenson submitted a timely objection to the Application. On January 2, 1975 Mr. Arthur Rambo submitted a timely objection to the application. On January 9, 1975 Mr. Mike Burkhartsmeier submitted a timely objection to the application. On January 21, 1975, Mr. Virgil Jurenka submitted a timely objection to the application. All of the above objections are on the grounds that there are no unappropriated waters in the proposed source of supply and that the proposed appropriation will adversely affect the objectors prior existing water rights from the source of Sage Creek.

Mr. Jim Grammer, lessee of the Applicant, testified that the proposed reservoir is at least one mile from Sage Creek. The drainage area serving the reservoir is approximately that

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serving 1/4 mile of stream length. The dam is equipped with an earthen overflow. Mr. Grammer is sure that the water would go on into Sage Creek if it didn't soak into the ground. Mr. Grammer said that, pursuant to Interim Permit No. 2816-s40G, the dam had been constructed and was not equipped with a drainage device of any type.

Mr. Robert Bond testified that he did not believe that these small reservoirs would adversely affect water rights 25 miles downstream on Sage Creek.

Mr. Ralph Eklund testified that he surveyed the dam and reservoir site and is generally familiar with the surrounding drainage area. Based on his experience as a technician, Mr. Eklund does not think that the water impounded in this reservoir would reach the objectors' downstream appropriations. He doesn't think that anyone could tell if the water impounded in the reservoir would flow one mile down to Sage Creek.

Mr. Mike Burkhartsmeier testified that he has water rights from Sage Creek as evidenced by the list of Notice of Appropriation of Water Right introduced as Objectors' Exhibit No. 4. He owns 4,800 acres adjacent to Sage Creek. He has a reservoir on Sage Creek which covers 350 surface acres. He uses the water for stock-water and he raises hay on the edge of this reservoir. The reservoir is equipped with a large pipe which he uses to flood 84 acres behind a large dike. He irrigates another 45 acres with small ditches.

He raises crested wheat grass and native blue joint on these irrigated acres. He has raised up to 140 tons of hay. He usually

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runs up to 150 head of cattle. In recent years he has not been able to irrigate to the customary full amount. This reservoir is labeled Magnum Reservoir on the Department's plat map. In the Spring of 1974, the Sage Creek Hutterite Colony released water down to Mr. Burkhartsmeyer upon a judge's order.

Mr. Burkhartsmeyer thinks that the recent water appropriations upstream have dried up Sage Creek and prevented him from exercising his water rights. Mr. Maynard Johnson testified that for the last 4 years there has been no runoff and that his reservoirs have been dry.

Mr. Arthur Rambo testified that he owns about 3,500 acres adjacent to Sage Creek. As indicated by Objector's Exhibit No. 5, he irrigates 100 acres from the source of Sage Creek by means of dikes and ditches and diversion dams. His irrigation works are shown on the Department's plat map of T. 33N., R. 11E. Mr. Rambo believes that the continued building of small dams upstream has dried up Big Sage Creek and prevented him from fully exercising his water rights in recent years. Mr. Rambo has seen several dry years since 1951, but until recently (since 1970) he was always able to fill at least some of his water rights. He has no knowledge of any new reservoirs which are stopping water which should be his.

Mr. Virgil Jurenka testified that, as evidenced by Objectors' Exhibit No. 3, he uses water from the source of Big Sage Creek for stockwater and irrigation. He has a concrete and rock diversion

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dam right in the creek bottom from which he diverts water into a reservoir from which he irrigates 98 acres of alfalfa and 55 acres of small grain. He has not been able to irrigate since 1972. He believes that the creek has been dried up, because of the drought and also because of other dams constructed upstream.

The Department plat map of T. 35N, R. 9E., shows Mr. Jurenka's irrigated acreage, but does not show his point of diversion. He has seen new dams on the John Duncan property, the Sage Creek Hutterite Colony, the Turner property, and several on side coulees where he did not know the property owner.

He has not had sufficient water since<sup>c</sup> 1972. Even before 1972 Mr. Jurenka had been required to respect prior appropriators. Big Sage Creek normally dries up in the fall.

On behalf of Mr. Stevenson, Mr. John Warner testified that Mr. Stevenson claims water rights from the source of Big Sage Creek dating back to 1898 as evidenced by Objector's Exhibit No. 6.

To clarify issues of fact raised at the hearing, the Hearing Examiner requested Department personnel to make a field investigation of the Big Sage Creek area. The personnel made the inspection and prepared a report, copies of which were served on all parties. As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Conclusions of Law and Order to the Administrator of the Water Resources Division, Department of Natural Resources and Conservation.

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PROPOSED FINDINGS OF FACT

1. The Applicant seeks to appropriate 2 acre-feet of water per annum for stockwatering purposes from an intermittent coulee which is tributary to Big Sage Creek. The water is to be stored in a reservoir approximately one mile from Big Sage Creek.

2. The dam was designed by Soil Conservation Service personnel and was constructed according to the Soil Conservation Service specifications.

3. The dam was constructed pursuant to Interim Permit No. 2816-s40G issued by the Department on September 13, 1974. Item 12(2) of this Interim Permit required "the permanent installation of an adequate drainage device, channel or any other necessary means to satisfy existing water rights."

4. The dam is not equipped with any drainage device of any type.

5. There has been a drought and very little runoff in the drainage area serving Big Sage Creek for the last 2 or 3 years.

6. Mr. Virgil Jurenka has an apparent prior existing water right to take water from the source of Big Sage Creek for the quantity of his actual beneficial use.

7. Mr. Mike Burkhartsmeier has an apparent prior existing right to take water from the source of Big Sage Creek for the quantity of his actual beneficial use.

8. Mr. Arthur Rambo has an apparent prior existing right to take water from the source of Big Sage Creek for the quantity of his actual beneficial use.

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9. Mr. Terry Stevenson has an apparent prior existing right to take water from the source of Big Sage Creek for the quantity of his actual beneficial use.

10. The testimony did not establish that the subject water of the application would not reach the objectors in any event.

11. There was no evidence presented showing the streamflow available in Big Sage Creek or the drainage area, precipitation and proportion of runoff serving Big Sage Creek above the objectors point of diversion.

12. The field investigation by Department personnel determined that the objectors and the applicants all had adequate water to fill their diversion works this May of 1975.

From the foregoing Proposed Findings of Fact, the Hearing Examiner hereby makes the following Proposed Conclusions of Law.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the above-mentioned unnamed tributary to Big Sage Creek.

2. In May of 1975 there were unappropriated waters in Big Sage Creek and its tributaries.

3. Conditioning the permit subject to prior existing rights and requiring installation of an adequate drainage device will protect prior existing rights.

4. The means of construction are not adequate for lack of a drainage device.

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5. The proposed use is a beneficial use. Stockwater is a beneficial use.

From the foregoing Proposed Findings of Fact and Conclusions of Law, the Hearing Examiner hereby makes the following Proposed Order.

PROPOSED ORDER

1. That the Applicant's Provisional Permit be approved with the condition that the permanent installation of an adequate drainage device, channel, or any other necessary means to satisfy existing water rights be completed and checked by Department personnel.

2. That the Applicant's Provisional Permit be revoked unless said adequate drainage device is installed by June 1, 1976.

3. That the permit be subject to all prior existing water rights in the source of supply.

NOTICE: This is a Proposed Order and will become final when accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to this Proposed Order shall be filed with the Department and with opposing parties within (10) days of receipt of same. Upon receipt of any written exceptions by the Department, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 14<sup>th</sup> day of November, 1975.

James A. Lewis

HEARING EXAMINER

By: JAC

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